In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND DIEGO ASARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were entitled to move to suppress the use before a grand jury of recordings of their conversations obtained by electronic surveillance.

Petitioners' conversations in a private room adjoining a bar and restaurant were overheard and recorded by means of concealed microphones placed by government agents pursuant to orders issued by the United States District Court for the Eastern District of New York on April 12 and May 3, 1973 (orders of Judge John R. Bartels), and May 24, 1973 (order of Judge Edward R. Neaher) (Pet. App. C, p. 9a). The signed orders and the accompanying applications and affidavits were sealed by the issuing judges pursuant to 18 U.S.C. 2518(8)(b) and placed in the vault of the Court Clerk (Appendix in the Court of Appeals, p. A 18). In September 1973, petitioners and about 40 other persons were served with inventory notices, as provided by 18 U.S.C. 2518(8)(d), notifying them that the

interception orders had been entered and that oral communications had been intercepted. Petitioners were subsequently served with grand jury subpoenas requiring them to provide voice exemplars for comparison with the intercepted communications. Petitioners supplied the requested voice exemplars, but were not required to testify before the grand jury (Pet. App. C, p. 9a).

In December 1973, petitioners went before a different judge of the district court, seeking a hearing to determine the existence and validity of the intercept orders and an order "suppressing such intercepted conversations from being used before any Grand Jury in this District, and further prevent[ing] the use of such intercepted conversations from being used to compare same to voice exemplars given by the above named parties" (Appendix in the Court of Appeals, p. A 3). At argument on the motion, petitioners moved in the alternative either for suppression or for return of the intercepted conversations under Rule 41(e), Fed. R. Crim. P. The judge held that petitioners had the right to move for suppression of the conversations under 18 U.S.C. 2515 and ordered that the prosecutor make no use of the intercepted conversations before the grand jury until counsel for petitioners could examine the documents supporting the interception and determine whether to proceed with the motion to suppress (Pet. App. B). The court of appeals reversed (Pet. App. C), holding (1) that the constitutional exclusionary rule could not be invoked by witnesses before the grand jury, (2) that 18 U.S.C. 2515 did not provide a statutory basis for a motion to suppress evidence before the grand jury, and (3) that the conversations were not "property" within the meaning of Rule 41(e).

1. Despite petitioners' attempt to portray themselves merely as "citizens who were notified that their voices had been intercepted" (Pet. 8) and who seek discovery only in connection with a civil action to suppress evidence (Pet. 5, 9), it is clear from the initial motion that they are potential grand jury witnesses who seek the suppression of grand jury evidence.[1] See *United States* v. *Dionisio*, 410 U.S. 1, where persons in exactly the same situation as petitioners were uniformly considered witnesses. There is, however, no basis in Title III of the Safe Streets Act for motions to suppress grand jury evidence. *Gelbard* v. *United States*, 408 U.S. 41, 59-61; *Cali* v. *United States*, 464 F.2d 475, 478-479 (C.A. 1). Such motions are also contrary to the wide latitude for evidence presented to grand juries, as recently expressed by this Court in *United States* v. *Calandra*, 414 U.S. 338, 343-345, and as understood by Congress when it enacted Title III (see *Gelbard* v. *United States, supra*, 408 U.S. at 60). Since petitioners are merely potential grand jury witnesses, and not civil contempt defendants, their contention here is not supported by the holding in *Gelbard* that grand jury witnesses "may invoke the prohibition of §2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify." 408 U.S. at 47.[2]

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[1]Because the court of appeals stayed issuance of its mandate (Pet. App. D), the grand jury proceedings have been unable to go forward since January 2, 1974, the date of the district court's order.

As the court of appeals noted (Pet. App. C, pp. 11a, 14a), if petitioners are non-witnesses, their interest is even less able to defeat the interest in the unhampered operation of the grand jury system.

[2]Therefore, *In re Persico*, 491 F.2d 1156 (C.A. 2), certiorari denied, No. 73-1741, October 21, 1974; *In re Marcus*, 491 F. 2d 901 (C.A. 1), and *In re Lochiatto*, 497 F. 2d 803 (C.A. 1), cited by petitioners (Pet. 6-8), are inapposite because those cases involved grand jury witnesses defending against civil contempt for refusal to answer questions.

Petitioners do have a means of discovering the documents supporting the interception. 18 U.S.C. 2518(8)(d) provides that persons who have received inventory notices, as petitioners have, may file a motion with the issuing judge, who may, in his discretion, make available to them such portions of the intercepted communications, applications, and orders as he determines to be in the interest of justice. It is clear, however, from the sealing requirements of 18 U.S.C. 2518(8)(b)[3] and from 18 U.S.C. 2518(8)(d) that Congress intended that the issuing judge would control the recordings and authorization papers in the investigative stage of the proceedings and that access thereto by persons overheard would be only through the issuing judge.[4]

2. Petitioners contend that regardless of the language of Title III of the Safe Streets Act, they may seek suppression and return of their conversations under Rule 41(e), Fed. R. Crim. P. This contention was rejected by the court of appeals (Pet. App. C, pp. 14a-15a), relying on its opinion in *Bova* v. *United States,* 460 F.2d 404 (C.A. 2). In that case it held that seized conversations are not "property" within the meaning of Rule 41(e) because "[i]t is obviously impossible to excise and surrender to the appellants the memories of the agents who conducted the interceptions, and the tapes and logs, as tangible items, are the Government's property, not the appellants'." *Id.* at 407.[5] The same analysis applies here.

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[3]Section 2518(8)(b) provides that applications made and orders granted under Title III shall be sealed by the issuing judge.

[4]Section 2518(8)(b) provides that for good cause shown the intercept papers may be unsealed by any district judge. This would be necessary, for example, if the issuing judge had retired, died, or was otherwise unavailable.

[5]While it may be useful at times to analogize the seizure of wire or oral communications to the seizure of physical property, it would be unreasonable to extend the analogy to hold such communications to be property under Rule 41(e). For example, if oral communications are property, then gambling communications would have to be deemed contraband and hence non-returnable.

Moreover, petitioners cannot maintain their motion to suppress under Rule 41(e) because the Rule "does not constitute a statutory expansion of the exclusionary rule," which itself does not permit suppression motions to interfere with the grand jury. *United States* v. *Calandra, supra,* 414 U.S. at 348-349, n. 6.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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